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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 480

DENIA M. FAWCETT, Administratix of the Estate of Floyd S. Fawcett,
Petitioner,

versus

MISSOURI PACIFIC RAILROAD COMANY,
Respondent.

ORIGINAL BRIEF OF RESPONDENT UPON PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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May It Please the Court:

STATEMENT OF THE CASE

Decedent was killed December 4, 1961, while engaged in loading "piggy-back" trailers onto a railroad flat car at Kinder, Louisiana. He was crushed between two trailers

when a truck driver backing his truck failed to see decedent. (TR 118).

Decedent had been employed by Missouri Pacific Transport Company from September 30, 1939, until the date of his death. (TR 8).

Decedent was hired by the Transport Company, was paid by the Company, and his employment was covered by the Social Security Act and Fair Labor Standards Act. His employment was under the provisions of a contract between said Company and the Teamsters Union. His employment was covered by workmen's compensation and his widow received the benefits therefrom. (TR 8).

Although decedent was killed on Railroad premises, the premises were the subject of a lease agreement between the Railroad and the Transport Company. (TR 53, 104). No Railroad employees were present, nor did any such employee have any supervision of decedent or of decedent's supervisors. (TR 103-106). Decedent, through his supervisor, received his orders from the higher officials of the Transport Company. (TR 105, 106).

Decedent's work consisted of loading and unloading freight, which the consignee would otherwise do, and in assisting in the transport of freight over the highways.

Decedent's employer operated its business with the Railroad under a basic lease and operating contract. (TR 36-44). The premises at Kinder were also the subject of a lease. (TR 53).

The Transport Company is a Texas Corporation, licensed by the ICC to conduct highway transportation of

freight. (TR 10-14, 54). The Railroad is a Missouri corporation licensed by the ICC as a railroad carrier. (TR 11).

All of the capital stock of the Transport Company is owned by the Railroad. (TR 50-51). The Transport Company has eleven officers and the railroad forty-eight. Five of these fifty-nine officers are officers in both corporations. The Transport Company has seven directors and the Railroad fifteen. Three directors of the twenty-two directors are common to both corporations. (TR 143).

ARGUMENT

The Fifth Circuit Court of Appeals has previously held that summary judgment is properly granted in cases where it conclusively appears from the record, including affidavits and other supporting evidence, that there is no genuine issue as to material fact. *Cunningham v. Securities Investment Co. of St. Louis*, 278 F.2d 600 (5th Cir. 1960).

We do not burden this Court with further citation, but respectfully submit that this is a settled law.

Turning to the basic facts of this case, we immediately see that this Court has previously held that each case must be decided on its own peculiar facts. *Ward v. Atlantic Coast Line*, 362 U.S. 396, 80 S.Ct. 789 (1960). The question in each case is whether the railroad is or is not, the "employer" of the injured workman, within the meaning of the FELA.

The cases fall into two main categories. In the first, the question which is presented is whether or not the Rail-

road exercised such control and direction of the employee as to be termed his "employer" under the common law doctrine of Master and Servant. *Ward v. Atlantic Coast Line, supra; Restatement of Agency*, Sec. 220. Interesting discussions of this point are found in *DePaola v. New York & New Haven R.R. Co.*, 198 F.Supp. 12 (Conn. 1961), and *Valentine v. South Coast Corp.*, 218 F.Supp. 148 (E.D., La., 1963).

The District Judge, in his opinion (TR 136), and in his findings of fact (TR 142), resolved the question in favor of the Railroad and found that Fawcett was not the employee of the Railroad, under the theory of Master and Servant. We think he was correct, and do not burden this Court with an extended argument on the subject. The record fully substantiates the finding.

The second category of these cases involves a situation in which the injured employee is the primary employee of a third party, usually a contractor. The question to be resolved in this situation is whether or not, either by the contract itself, between the Railroad and the contractor-employer, or by the manner in which it is executed, the Railroad reserves such control over the activities of the employee as to be deemed his employer for the purposes of the FELA. *Del Vecchio v. Pennsylvania R.R. Co.*, 233 F.2d 2, 4 (3rd Cir. 1956); *Cimorelli v. New York City R.R. Co.*, 148 F.2d 575 (6th Cir. 1945).

Defendant, Missouri Pacific Railroad, in this suit, takes the position that the situation here is the same as that in the *Del Vecchio* case above cited. In the *Del Vecchio* case plaintiff was an employee of Northern Contracting

Company. Northern, under a written contract with the defendant Railroad, handled coal for the latter, for transshipment into seagoing vessels. The Court there was called upon to interpret the contract, and the manner of its execution, to determine whether or not the Railroad had such control over the plaintiff as to be his employer. In reaching a negative result, the Court quoted from the contract as follows:

> "The work to be performed by the Contractor under this agreement is to be done promptly and adequately in all respects, and in the performance of such work the Contractor will furnish all labor and supervisory force of every kind and description. And it is expressly understood and agreed that the Contractor shall be and remain an original private and independent contractor, hereunder, and shall employ, pay from its own funds, and discharge all persons engaged in the performance of such work, and all such persons shall be and remain the sole employees of the Contractor, and subject to its exclusive authority, supervision, direction and control." (233 F.2d 2, 3-4).

Paragraph 10 of our Railroad-Transport Company contract, found on page 42 of the transcript, contains language to the identical legal effect as the contract in *Del Vecchio*. It reads:

> "The contractor shall employ and direct all persons performing any service hereunder and such persons shall be and remain the sole employees of and subject to the control and direction of the Contractor, and not the employees or subject to the direction and control of the Railroad, it being the intention of the parties hereto that the Contractor shall be and remain an independent contractor and that

nothing herein contained shall be construed as inconsistent with that status."

We respectfully submit that these two contracts have the same effect, and that as such the Transport Company here is an independent contractor.

The only remaining question is to examine the manner in which the contract was executed, since this would govern over the written contract, especially in the event that the Railroad actually controlled the employee in the course of the work. As to this point, plaintiff produced, on November 21, the testimony of Fawcett's supervisor and his fellow workmen. (TR 93-128). This testimony is conclusive that no railroad personnel had anything to do with the work of Fawcett; that he was in fact directed and controlled by his supervisor, who in turn received his orders from the main office of the Transport Company, and that Fawcett was hired and paid by the Transport Company, not the Railroad. We can see none of the affirmative elements required for the relationship, as set out in the Restatement of Agency.

Some time after producing this evidence, plaintiff took the deposition of Courville, a fellow worker of Fawcett, and supplemented this with an affidavit, in an attempt to show control over Fawcett's activities by the defendant Railroad. (TR 60-81). Plaintiff's counsel has urged in his brief that this testimony shows such control. However, examination of the testimony merely reveals that the custom of obtaining bills of lading from railroad personnel and remitting freight receipts to them, when Transport personnel were away, the taking of messages for

freight orders, and similar activities, was merely a custom of operating the two different businesses in harmony and efficiency, rather than a situation of direction and control by railroad personnel of the Transport employees. (See TR 68-71). As to the testimony of the method of operation described at TR 79 and 80, we observe that if you or I, as shippers, desired to send freight via the railroad, we would be called upon to do just exactly what the Transport employees were called upon to do here.

Plaintiff relies on the cases of *Baker v. T & P R.R. Co.*, 357 U.S. 227, 79 S. Ct. 664 (1959); *Byrne v. Pennsylvania R.R. Co.*, 262 F.2d 906 (3rd Cir. 1959); *Mazzucola v. Pennsylvania R.R. Co.*, 281 F.2d 267 (3rd Cir. 1960), and *Cimorelli v. New York Central R.R. Co.*, 148 F.2d 575 (6th Cir. 1945), (followed by *Pennsylvania R.R. Co. v. Roth*, 163 F.2d 161 (6th Cir. 1947), cert. den. 332 U.S. 830, 68 S. Ct. 208, and *Pennsylvania R.R. Co. v. Barlion*, 172 F.2d 710 (5th Cir. 1949).

Plaintiff also relies on *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 78 S. Ct. 758 (1958), and *Leek v. B & O R.R. Co.*, 200 F.Supp. 368 (W. Va. 1962). However, as we will later demonstrate, these two cases are inapposite, dealing with another section of the FELA, and involving actual railroad employees.

Returning to the line of cases cited by plaintiff, commencing with the *Baker* case, we find that in each case there were certain factors of direct control of the employee under the Master and Servant doctrine. In *Baker*, the contractor had a contract with the railroad covering grouting services. However, the Court found that in the daily

course of the work, a railroad supervisor was present who actively directed the work of the individual workmen, including the amount of material to be used, the place of the work, and even when the equipment was to be moved to the next location.

Remembering that defendant's position relies on the *Del Vecchio* case in the 3rd Circuit, we find that plaintiff's cases of *Byrne* and *Mazzucola*, also decided by the 3rd Circuit, reached contrary results from the *Del Vecchio* case, but without encountering any difficulties as to the application of legal principles.

In the *Byrne* case, the employee was hired by Westinghouse, the contractor. However, the employee was under the direct supervision of a railroad supervisor, being on call twenty-four hours a day, and being directed as to just what work to do on each locomotive, and even on occasion riding locomotives while performing the duties of a fireman. Actually, in this case, the terms of the contract were not discussed, apparently not being material.

Likewise, in the *Mazzucola* case, the contract itself, with *Mazzucola's* primary employer, gave the railroad directive control of the work, including the right to take over and perform the work with its own forces whenever it deemed necessary.

In the *Cimorelli* case, also relied upon by plaintiff, although the contract with the Duffy Company purported to make it an independent contractor, the court found:

> "The whole project involved many independent details, the control of any one of which could not be

> surrendered without disorganization of the whole. From the very nature of the work its performance could not be committed exclusively to the discretion of the Duffy Co." 148 F.2d 575, 577.

Lastly, we distinguish the *Sinkler* and *Leek* cases relied on by plaintiff. All of the previous cases discussed here have dealt with Section 5 of the FELA, as to whether, by contract or otherwise, the railroad has sought to avoid the coverage of the FELA *as to someone in reality its employee.*

In the *Sinkler* and *Leek* cases, the injured workmen were in fact *regular employees of the railroad*, who were injured by third parties having a contract with the railroad. There the Court interpreted Section 1 of the FELA, in deciding that the third party were "agents" of the defendant railroads, under Section 1 of the FELA. In this case, plaintiff is asking the Court to say that an employee, ostensibly of a third party, is in fact the employee of defendant railroad.

Plaintiff's final theory is that through stock ownership of the Transport Company the Railroad has made it its "alter ego," and therefore is the employer of Fawcett and all the other Transport Company employees. The District Judge did not agree to this theory. We fully concur in his statement:

> "As we analyze it, plaintiff's real contention is that because the trucking company is a wholly owned subsidiary of the defendant, it, the trucking company, was the alter ego, adjunct, subsidiary agent, and instrumentality of the railroad. The jurisprudence as we read it is to the contrary. *Atlantic*

Coastline R.R. Co. v. Shields, 5th Cir., 1955, 220 F.2d 242; *Garrett v. Southern R.R. Co.*, 6th Cir. 1960, 278 F.2d 424; *Kentucky Electric Power Co. v. Norton Coal Mining Co.*, 6th Cir. 1938, 93 F.2d 923; *Taylor v. Standard Gas & Electric Company*, 10th Cir. 1938, 96 F.2d 693." (TR 138, 139).

We further concur, and urge the logic of the District Judge upon this Court, that:

> "Plaintiff has alerted us to avoid intercompany arrangements drawn to avoid federal jurisdiction under the FELA. We find nothing here indicative of such a purpose, but we point out as did the Third Circuit (*Shaw v. Monessen Southwestern R.R. Co.*, 200 F.2d 841) that we should also be alert to avoid the extension of a statute applicable to railroad employees in interstate transportation to cover those engaged in other occupations. Such an extension might well deprive a widow and children, as it would here, of their rights under a state compensation act where their right of recovery would not depend upon proof of negligence." (TR 140).

Plaintiff would have the Court believe that the Railroad created the Transport Company only for the purpose of evading the FELA. However, as noted by the District Judge (TR 112), it is common knowledge that the Railroads have formed transport companies to meet the competition of the highway carriers and to make their business more convenient and attractive to the shippers.

Further, this extension of service involves *highway transportation*, not *rail transportation*. Fawcett was working with and around highway trailers and steerable, rubber-tired tractors to pull those trailers. We all know that

the purpose of the FELA is to protect railroad workers in their peculiar occupation.

To refuse summary judgment here would, in the future, burden the Federal Courts with many additional lawsuits. The Courts would be burdened, as it was in the *Mazzucola* case, with arguments as to whether the Safety Appliance Act applies to the brakes of a highway tractor and trailer combination. The possibilities approach the ludicrous. Is Interstate Highway 10 an "unsafe place to work", or is it "safe" while Highway 90 is not? Did the railroad "furnish" the highway, or did others? If Fawcett had been killed at a railroad crossing by a Missouri Pacific train, what type of action would he bring? Suppose it was a Southern Pacific crossing. Who to sue?

We respectfuly submit that this case falls within the purview of the cases of *Del Vecchio*, *DePaola* and *Valentine*, and that the authorities relied upon by plaintiff do not fit the case. We urge that the petition for the writ be denied.

Respectfully submitted,

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CERTIFICATE

Dallas, Texas
September 20, 1965.

I hereby certify that a copy of the foregoing brief has this date been mailed to attorney for plaintiff, Mr. John A. Hickman, 419 Weber Bldg.

William C. Slowey, Jr.
Of Counsel for Respondent.